**BEFORE THE**

**STATE OF CALIFORNIA**

**OCCUPATIONAL SAFETY AND HEALTH**

**APPEALS BOARD**

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| In the Matter of the Appeal of:<br><br>JA CON CONSTRUCTION SYSTEMS, INC. dba JA CON CONSTRUCTION<br>P. O. Box 399<br>Poway, CA 92074<br><br>Employer | Docket No. 03-R3D2-441<br><br>**DECISION AFTER RECONSIDERATION** |

The Occupational Safety and Health Appeals Board, pursuant to authority vested in it by the California Labor Code, having ordered reconsideration of the decision of the Administrative Law Judge (ALJ) in the above-entitled matter on its own motion and having taken the petition for reconsideration filed by JA CON Construction Systems, Inc. (Employer) under submission, makes the following decision after reconsideration.

## JURISDICTION

Employer provides lumber, trusses and labor for construction framing. On August 8, 2002, the Division conducted an accident investigation at a place of employment maintained by Employer at 1683 Burris Dr., El Cajon, California (the site) through Compliance Officers Darcy Murphine (Murphine) and Robert Marsh (Marsh).

On January 15, 2003, the Division issued a citation to Employer for a serious violation of section 1704(b)[1] [pneumatically driven nailers] with a proposed civil penalty of $4,725.

On February 1, 2005 a hearing was held before an Administrative Law Judge (ALJ) of the Board. On March 1, 2005, a decision was issued by the ALJ finding a serious violation and assessing a civil penalty of $4,725.

The Board, on its own motion, ordered reconsideration of the ALJ's decision on March 25, 2005. Employer filed a timely petition for

[1] Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

reconsideration of the decision on April 1, 2005. On May 6, 2005, the Division filed an opposition to Employer's petition. The Board took Employer's petition under submission on May 18, 2005.

**EVIDENCE**

No new evidence has been taken in this matter. The Board's decision is based upon the evidence received at hearing and the tape recorded record. The ALJ's factual findings, located on pages 2 through 6 of the decision are incorporated herein and adopted as the findings of the Board.

The evidence relates to two conditions (two instances) involving a pneumatic nailer (nailer) occurring on two separate dates, the date of an accident (first incident) and the date of the inspection (second incident). The ALJ dismissed the citation for the first incident and the dismissal was not appealed. The only aspects of the ALJ's decision before the Board are the finding of a violation for the second incident, its classification as a serious violation and the use of the prior accident as evidence in determining the second incident was a serious violation.

Employer provides lumber, trusses and labor for construction framing. On August 8, 2002, Murphine and Marsh arrived at Employer's site in El Cajon, a production housing development consisting of multiple single family homes.

Upon arriving Murphine and Marsh presented themselves at the general contractor's trailer and were informed that Employer's superintendent, Scott Dye, was not present, but was en route from another of Employer's job sites in San Diego County. After his arrival, Dye and an employee of the general contractor took Murphine and Marsh to the site where the accident (incident 1) had occurred on August 6, 2002.

A photograph showing the accident location was entered into evidence. It shows the site was a single family home under construction, the majority of the framing having been completed but that the exterior siding was not yet affixed.

Murphine testified that when they arrived at the site no employees were observed. She, Marsh, Dye and the general contractor's employee entered the house and had a discussion regarding the accident. Marsh then exited the house and observed a nailer resting on the ground near the base of an exterior wall. The nailer was connected to an air compressor that was charged between 100 and 120 psi[2]. Marsh then reentered the house and brought Murphine and

[2] PSI means "pounds per square inch" of air pressure.

Dye to the scene of the nailer. After disconnecting it from the compressor, the nailer and the compressor were photographed by the compliance officers.

Murphine first observed an employee Librado Feria (Feria) at the scene after photographing the nailer and compressor. She interviewed Feria and determined that he was an employee based upon his statements and Dye's admissions.

Murphine testified that 5 to 10 minutes elapsed between her arriving at the site and first seeing Feria. She opined that therefore the nailer had been left unattended for a period of 5 to 10 minutes while connected by a hose to a charged compressor. Murphine alleged that Feria told her that he was working correcting a windowsill and he had left the site to get additional materials from another house (site) that Employer was constructing down the hill. In her opinion, that site was one-half mile away.

In Murphine's opinion, the nailer is a type used in framing construction, and is designed to have a safety device on the muzzle that prevents the tool from operating unless the muzzle is in contact with a solid surface. Therefore, in order to expel a nail/projectile the muzzle must be in contact with a solid surface and the trigger must be simultaneously engaged.

Murphine testified that the safety device consists of a spring located in the muzzle and that it could be easily removed permitting the nailer to be operated by only engaging the trigger. She opined that under these circumstances, the nailer could be pointed, the trigger engaged, and a projectile (nail) would be discharged in a manner analogous to a gun.

While at the site, Dye admitted that the nailer in question was the same make and model involved in the accident two days earlier. However, there was no evidence that it was the same nailer.

Photographs depicting the nailer and the compressor were entered into evidence. They depict the make and model of the nailer; its location at the site and the compressor. The photograph of the compressor shows the gages and they indicate it was charged between 100 and 120 psi. The compressor is of a type that permits the operator to adjust the air pressure and therefore the velocity of the nail being ejected.

There was no evidence presented at hearing as to whether the safety device on the nailer was operational, or whether it was loaded with nails when it was discovered allegedly unattended. The Division introduced into evidence 3-¼ inch nails that are of the type used in the make and model of the nailer at issue. However, there was no evidence regarding the diameter of those nails.

As a result of the second incident, Employer was cited for a serious violation of section 1704(b) because a pneumatic nailer (nailer) was allegedly

left unattended at the site while connected to a charged compressor. Murphine cited Employer for a serious violation because the nailer could allegedly expel a projectile, a 3-¼ inch nail that was likely to cause serious injury upon striking an employee.

Feria testified for Employer that he was working alone at the site and was using the nailer to correct a windowsill. He said he left for 1 minute to get additional lumber from around the back of the site in furtherance of this task. Upon returning he observed Murphine, Marsh and Dye. He did not want to disturb them, so he entered the house, went upstairs and performed another job. Feria proffered that he was returning from that task when Murphine first observed him.

The ALJ resolved the conflict in testimony between Murphine and Feria in favor of the Division by finding Murphine more credible. However, the ALJ also found that the violation had occurred regardless of the conflict in testimony.

Over Employer's objection, Murphine testified that the safety order was intended to prevent people from being shot with nailers. The Division did not provide any foundation for Murphine's opinion or offer any other evidence in support of this position.

The classification of the violation as serious was based upon the occurrence of an injury involving the same make and model of nailer, two days earlier, and Murphine's opinion testimony, over Employer's objection to her qualifications. Murphine, without foundation, assumed that it was common knowledge that the effect of a nail being discharged into a human body was analogous to a person being shot with a gun. Therefore, the Division proffered there was a probability that death or serious physical harm would result if a nail struck an employee.

## ISSUE

Did an employee of Employer leave the nailer "unattended" and "not in use" while it was connected to the air supply at the tool?

## FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Employer was cited for section 1704(b) which reads as follows:

> (b) When not in use, or unattended, all pneumatically driven nailers and staplers shall be disconnected from the air supply at the tool.

Employer contends that the evidence does not support a finding that it violated section 1704(b) because:

1. The definition of "unattended" is not based upon time or distance;

2. The nailer was "attended" because an employee was on the site and the nailer would continue to be attended to as long as he was on the site;

3. Even if the definition of "unattended" is based upon time or distance, an employee spent only a brief period of time away from the nailer in order to obtain materials;

4. That employee was engaged in "using" the nailer as long as he was engaged in an activity related to its use;

5. Getting materials to assist in using the nailer is an activity related to its use.

The ALJ found and the Board disagrees that the nailer was "in use" and "unattended".

Murphine testified that she, Marsh and Dye arrived at the site together. At that time no employees were observed. They discussed the accident that occurred two days earlier, Marsh stepped outside and observed the nailer. He went and summoned Murphine and Dye; they disconnected the hose from that nailer and photographed the nailer and compressor. After they returned inside, Feria was first observed. Murphine opined that 5 to 10 minutes elapsed between arriving at the site and first observing Feria. At the hearing, Feria testified that he was gone for only one minute to obtain the needed materials.

The ALJ resolved the conflict in testimony in favor of the Division finding that Murphine was more credible that Feria. However, the ALJ found the conflict irrelevant because even if the nailer was unattended and connected for a period of one minute, that would constitute a violation of section 1704(b).

Still the Division's burden is to prove each element of a violation, and the applicability of the safety order. (*Teichert Aggregates* Cal/OSHA App. 00-3838, Decision After Reconsideration (Jan. 10, 2003) p.3.)

The Division did not prove each element of the safety order. It did not prove that the nailer was "not in use" and was "unattended". The Board disagrees with the finding that momentary absences of one minute would constitute a violation in all circumstances. The situation found on a particular job site presents unique facts. Determining whether a pneumatic nailer or stapler is "in use" or "unattended" should be premised upon the overall

circumstances and not solely upon a momentary separation between the attendant and the nailer.

The safety order is silent on its face as to the type of harm sought to be prevented. Murphine opined that the safety order was designed to prevent nailers from being used like a gun. She testified that the allegedly unattended nailer could be picked up by a person, aimed at another person, and the trigger engaged, discharging a nail like a gun fires a bullet.

These opinions lacked foundation, and the Division did not present any additional evidence regarding the types of harm the safety order sought to prevent i.e., whipping action of a hose under pressure, tripping hazards, etc.

No evidence was presented about whether the safety device on the nailer had been removed or modified thereby enabling it to discharge a nail without the muzzle being pressed onto a surface. Nor was there any evidence that the nailer was loaded with nails. Therefore, there was no evidence that the nailer at issue could actually be used in a manner similar to a gun, or that there was a projectile that could actually be discharged.

The Division did not prove the harm sought to be prevented was to ensure that nailers were not used like guns. Nor did the Division prove that the nailer in question was capable of being used like a gun.

## ISSUE

Was there employee exposure to the violation?

## FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Employer contends that the evidence does not support a finding that an employee was exposed to the hazard and was likely to come into contact with the danger zone because:

1. The only employee at the site was the nailer's attendant (Feria);

2. Employer's other employees were at another site approximately one half mile away from the danger zone.

The ALJ found and the Board disagrees that the Division established employee exposure to the violation by a preponderance of the evidence.

The Division did not establish, by a preponderance of the evidence, employee exposure to the dangerous condition with proof of actual exposure or by showing employee access to the zone of danger based on evidence of

reasonable predictability that employees, while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger.

According to Murphine's testimony, she saw no worker other than the nailer's attendant, Feria, at the site. Because the alleged violation is an unattended nailer, once its attendant returns there can be no infraction and since no other employees were in the vicinity, there could be no employee exposure to the alleged violation. If a hazard exists in the workplace but no employee is exposed to the hazard and is not likely to come into contact with the danger zone, a citation will not lie. (*Wickes Forest Industries* Cal/OSHA App. 79-1269, Decision After Reconsideration (Oct. 31, 1984) p.2)

Feria testified that he was working alone making repairs to a windowsill and that this type of work did not require the assistance of a helper. Nothing in the record contradicts this testimony.

There must be some evidence that employees came within the zone of danger while performing work-related duties, pursuing personal activities during work, or employing normal means of ingress and egress to their work stations for there to be a violation. (*Nicholson-Brown, Inc*. Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979) p.2)

To advance its position that an employee was exposed to the cited hazard, the Division relied on Murphine's testimony that the nailer *could be accessible* to other employees or members of the public. The Division may have been relying on *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003), where the Board revisited the issue of proving exposure without evidence of actual exposure, stating in relevant part:

> We hold that the Division may establish the element of employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger. [p. 26]

The *Benicia* decision did not reverse earlier Board precedent which holds that the Division must offer proof that employees have been or *are likely to be exposed* to the hazard created by the violative condition. (See, e.g., *The Home Depot U.S.A., Inc.*, Cal/OSHA App. 99-690, Decision After Reconsideration (March 21, 2002), citing *Wickes Forest Industries*, *supra.*; *Huber, Hunt & Nichols, Inc.*, Cal/OSHA App. 75-1182, Decision After Reconsideration (July 26, 1977); and *Ford Motor Co.*, Cal/OSHA App. 76-706, Decision After Reconsideration (July 20, 1979).) Proof that employees were not prevented

from accessing a work site does not alone suffice to prove employees were likely to access the danger zone. To the extent that *Benicia* may be read not to require the Division to prove the likelihood of employees approaching the zone of danger, it is disapproved.

Here, Murphine's testimony indicates other employees/crew were working at another site about one half mile away. She did not observe any other employees at the site and did not proffer any reason why there would be.

The Division did not present evidence that any other worker was likely to visit the vicinity of the nailer, that the area was a passage way to another work location or that it was an exit-way. There was no evidence that Feria was using a helper for his task or whether any other employees were anywhere near the site when he was working and/or when he went to retrieve materials. Nor was there evidence that any other employees had worked on the house that day before the compliance officers arrived at the site.

The Board sees nothing in the facts or the record to support the ALJ's decision finding employee exposure. The Board finds that the Division did not establish employee exposure in this case.

## ISSUE

Was there a probability that death or serious physical harm would result assuming an accident or exposure occurred as a result of the violation?

## FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERNATION

Labor Code section 6432 (a)(2)&(c) reads as follows:

> (a) As used in this part, a "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a violation, including, but not limited to, circumstances where there is a substantial probability that … the following could result in death or great bodily injury:
> (2) The existence of one or more practices, means, methods, operations, or processes which have been adopted or are in use, in the place of employment.
> (c) As used in this section, "substantial probability" refers not to the probability that an accident or exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation.

Employer contends that the evidence does not support a finding that a substantial probability of death or serious physical harm would result assuming an accident occurred as a result of the violation because:

1. Pursuant to the facts of incident 2 the nailer could not discharge a projectile;

2. There was no employee exposure;

3. The Division did not present sufficient evidence to support the conclusion that there is a "substantial probability" of death or serious injury if a nail were projected into a human body.

The ALJ found and the Board does not concur that the Division proved a probability that death or serious physical harm would result assuming an accident or exposure occurred as a result of the violation.

The record standing alone does not demonstrate a substantial probability of serious injury.

Murphine testified, the documentary evidence demonstrated, and Feria admitted, that the nailer was resting on the ground, connected to the compressor with a hose, near an exterior wall of a house being framed at the site. The compressor was charged to a pressure between 100 and 120 psi.

There is no evidence in the record to establish that the nailer was loaded with nails at the time or that any safety device on the muzzle had been removed, altered or was defective. Nor was there evidence that this specific nailer had caused previous injury to any persons. Evidence was presented that, two days earlier, the same make and model of nailer, while being passed between two employees, and due to an uncertain cause, had discharged a nail, striking an employee in the neck. The injured employee was transported to the hospital and released in less than twenty-four hours, and the injury proved to be less than serious.

The opinion testimony offered to support the serious classification lacked proper foundation. Establishing a substantial probability that death or serious injury will occur as a result of a nailer discharging and impacting a person is a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. Such testimony must be based on matter (including his/her special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him/her at or before the hearing, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which the testimony relates[3].

In attempting to qualify Murphine as an expert witness, she testified that she has a Bachelor in Science degree from the University of California at Davis, had been employed with Fed/OSHA for 2 years, and has worked for the Division 16 years. For the past 10 years she had conducted investigations and inspected construction sites and participated in residential housing construction sweeps conducted by the Division. She also testified that she had used a nailer at home.

No evidence was introduced whether Murphine had any specific knowledge, skill, experience, training or education regarding the injuries caused by the type of nailer at issue or that she had previously investigated injuries caused by a similar nailer. Nor was evidence introduced that she had any actual knowledge, skill, experience, training or education regarding how deep a nail projected at 100 to 120 psi would travel into the human body. The Division did not present any documentary or demonstrative evidence regarding the depth that a nail could penetrate the human body when projected at 100 to 120 psi or the injuries that could be caused as a result thereof.

Murphine gave opinion testimony that the nailer was analogous to a gun if the safety device on the muzzle was removed. Under this circumstance, the nailer could be fired by merely engaging the trigger, like a gun, without it being simultaneously pressed onto a solid surface. She did not testify that she or anyone else had determined that the nailer was loaded or that the safety device was not operational during the period it was allegedly "not in use" and "unattended". Therefore, her opinion was not based in actual evidence, but upon speculation.

Furthermore, Murphine testified without foundation that the type of injury that could result from the nailer being discharged was similar to injuries caused by a gun. This type of evidence is sufficiently beyond the common experience as to require the testimony of an expert witness. Murphine posited if the projectile was discharged into the human body it would penetrate deeply and that depending upon where it struck, it could cause loss of sight or even death. In support of this contention, she referenced an accident that occurred two days earlier at the site in which another employee was hit in the neck by a nail, injured and hospitalized but was released in less than 24 hours, a less than serious injury. The previous incident, rather than supporting her opinion, shows that the type of injury that can, and did occur, was non serious. Moreover, since the Division did not establish the type of harm the safety order addresses is limited to the harm from projectiles, the Board cannot infer that this is the type of injury that must be presumed for purposes of determining substantial probability.

The Board finds nothing in the facts or the record to support the ALJ's decision finding that there was a probability that death or serious physical harm would result assuming an accident or exposure occurred as a result of

the violation. The Board finds that the Division did not establish a serious violation in this case.

## DECISION AFTER RECONSIDERATION

The Board vacates the ALJ's decision finding a serious violation of section 1704(b) and assessing a $ 4,725 civil penalty. The citation is dismissed and the civil penalty is set aside.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: March 27, 2006